IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	BRIEF ON BEHALF OF APPELLEE IN RESPONSE TO SPECIFIED ISSUE
v.	
Private (E-2) **TIMOTHY E. BENNITT** United States Army, Appellant	Crim.App. Dkt. No. 20100172 **USCA Dkt. No. 12-0616/AR**

KENNETH W. BORGNINO
Captain, JA
Appellate Government Counsel
Office of The Judge Advocate General, United States Army
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060-5546
Phone: (703) 693-0754
U.S.C.A.A.F. Bar No. 35098

KATHERINE S. GOWEL
Major, JA
Branch Chief, Government Appellate Division
U.S.C.A.A.F. Bar No. 35191

AMBER J. ROACH
Lieutenant Colonel, JA
Acting Chief, Government Appellate Division
U.S.C.A.A.F. Bar No. 35224

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U N I T E D S T A T E S, Appellee v. Private (E-2) **TIMOTHY E. BENNITT** United States Army, Appellant	BRIEF ON BEHALF OF APPELLEE IN RESPONSE TO SPECIFIED ISSUE Crim.App. Dkt. No. 20100172 **USCA Dkt. No. 12-0616/AR**

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Specified Issue

IN SPECIFICATION 2 OF CHARGE I APPELLANT IS CHARGED WITH UNLAWFULLY KILLING LEAH KING WHILE AIDING AND ABETTING MS. KING'S WRONGFUL USE OF OXYMORPHONE, WHICH IS ALLEGED TO BE AN "OFFENSE" DIRECTLY AFFECTING THE PERSON OF MS. KING. MUST MS. KING'S USE OF OXYMORPHONE BE AN "OFFENSE" TO BE LEGALLY SUFFICIENT TO SUPPORT THE FINDING OF GUILTY UNDER ARTICLE 119(b)(2)?

Additional Statement of the Case

This Court granted review of the assigned issue on September 19, 2012. Appellant filed his orginal brief on the assigned issue on October 18, 2012. The Government filed its response on November 19, 2012.

Thereafter, on February 5, 2013, this Court issued an order directing the parties to respond to the specified issue outlined herein. Appellant filed his brief on the specified issue on February 15, 2013.

SPECIFIED ISSUE AND ARGUMENT

IN SPECIFICATION 2 OF CHARGE I APPELLANT IS CHARGED WITH UNLAWFULLY KILLING LEAH KING WHILE AIDING AND ABETTING MS. KING'S WRONGFUL USE OF OXYMORPHONE, WHICH IS ALLEGED TO BE AN "OFFENSE" DIRECTLY AFFECTING THE PERSON OF MS. KING. MUST MS. KING'S USE OF OXYMORPHONE BE AN "OFFENSE" TO BE LEGALLY SUFFICIENT TO SUPPORT THE FINDING OF GUILTY UNDER ARTICLE 119(b)(2)?

Standard of Review

The interpretation and statutory construction of Article 119(b)(2), UCMJ, is a question of law reviewed de novo.[1]

Law and Analysis

In order to be found guilty of involuntary manslaughter under Article 119(b)(2), UCMJ, the government must establish, in part, that the act or omission of the accused which caused the death of the victim "occurred while the accused was perpetrating or attempting to perpetrate an offense directly affecting the person."[2]

Both the specified issue and appellant apparently characterize the "offense" at issue in this case as Ms. King's wrongful use of a controlled substance. Appellant argues this is not actually an "offense" because Ms. King was not subject to prosecution for the wrongful use of a controlled substance under

[1] *United States v. Nerad*, 69 M.J. 138, 150 (C.A.A.F. 2010)(Stuckey, dissenting) (citing *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008)).
[2] *Manual for Courts-Martial* (2012 ed.) (*MCM*), part IV, ¶44.b.(2)(d).

either state of federal law. However, the "offense directly affecting the person" in this case is not Ms. King's wrongful use of a controlled substance; rather, it is appellant's aiding and abetting Ms. King's wrongful use of a controlled substance. These are two wholly separate and distinct offenses. The former relates solely to Ms. King's actions, while the latter is based upon appellant's own actions. Though Ms. King's conduct is relevant to both, it is appellant's conduct that is the crux of the offense of aiding and abetting the commission of an offense under Article 77, UCMJ.

Appellant is correct that Ms. King could not have been prosecuted for her wrongful use of a controlled substance. However, as discussed in the government's original brief before this court, appellant can still properly be considered to have aided and abetted Ms. King's wrongful use of a controlled substance. As the Army Court of Military Review has held, "[t]he amenability of the actual perpetrator to prosecution is not a requirement for criminal liability as an aider and abettor. The determinant is whether the act aided and abetted is an offense, not whether the perpetrator is subject to prosecution."[3]

[3] *United States v. Minor*, 11 M.J. 608, 611 (A.C.M.R. 1981).

This court has implicitly accepted that principle. In *United States v. Hill*,[4] this court affirmed the conviction of an accused who aided and abetted the wrongful distribution of narcotics, despite the fact that the individual he was aiding and abetting was a civilian and not subject to jurisdiction under the UCMJ.[5] Later, in *United States v. Jones*, this court affirmed the conviction for attempting to distribute a controlled substance under the theory that the accused aided and abetted in the distribution.[6] However, the individual whom the accused in that case was aiding and abetting was apparently a civilian, not subject to prosecution under the UCMJ.[7] Despite this fact, this court found that the evidence was sufficient to establish that the civilian had "committed the crime of attempted distribution."[8] Based on the accused's aiding and

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[4] 25 M.J. 411 (C.M.A. 1988).
[5] *Hill*, 25 M.J. at 414-15.
[6] *United States v. Jones*, 37 M.J. 459 (C.M.A. 1993).
[7] *Id.* at 460. The record refers to the distributor as a "Mimi Snead," a friend of the accused's. It is the implication in the decision, based on the lack of reference to her rank, that Mimi Snead was not a servicemember.
[8] *Id.* at 461. Appellant's argument that these cases can be distinguished because the "civilian actor committed acts that are undoubtedly criminal in any jurisdiction" conflicts with the plain language of Article 77, UCMJ, which requires that the offense committed be one punishable under the UCMJ. The question is not whether the principal committed any offense under the law, but rather whether they committed an offense under the UCMJ for Article 77, UCMJ, to apply.

abetting her attempted distribution, he was rightfully found guilty.[9]

The Air Force has also come to the same conclusion, and explained the rationale behind this principle, as applied to the similar Article 78, UCMJ:

> It would place a most difficult burden on military law to construe Article 78, Uniform Code of Military Justice, as being inapplicable in situations where the principal offender was not subject to trial and punishment under the Code. In many instances, the only practical solution would be to turn the military accessory over to the Federal or state court, as applicable, since an alternative prosecution under the general article would be very difficult and risk the hazard of preemption. Further, if the offense occurred in a foreign country, the accused would either go unpunished, or have to be turned over to a foreign court, always a sensitive and undesirable situation.[10]

Under appellant's theory, were a soldier to aid and abet the commission of a bank robbery with a number of civilians, the military would lack authority to prosecute the soldier as an aider and abetter of the robbery because the principal perpetrators were not subject to the UCMJ. This would defeat the purpose of the military justice system's worldwide jurisdiction over the criminal actions of soldiers.

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[9] *Id.*

[10] *United States v. Blevins*, 34 C.M.R. 967, 979 (1964)(internal citations omitted), review denied, 35 C.M.R. 478.

The plain language of Article 77, UCMJ, supports the rationale of these courts. It provides that "[a]ny person punishable under this chapter who . . . commits an offense punishable by this chapter or aids, abets, counsels, commands, or procures its commission . . . . is a principal."[11] The only requirement is that an "offense punishable by this chapter," (the UCMJ), be committed, not that the person committing the offense be amenable to prosecution.

Contrary to appellant's arguments, this is in accord with federal practice under 18 U.S.C. §2(a).[12] As the Supreme Court has pointed out: "[w]ith the enactment of that section [18 U.S.C. §2], all participants in conduct violating a federal criminal statute are 'principals.' As such, they are punishable for their criminal conduct; *the fate of other participants is irrelevant.*"[13] Whether the principal is eventually acquitted or is even ever charged is immaterial: "it is beyond dispute that a person charged with aiding and abetting a crime can be convicted regardless of the fate of the principal."[14] In fact, no principal need even be identified for an accused to be properly

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[11] UCMJ, art. 77.

[12] "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal."

[13] *Standefer v. United States*, 447 U.S. 10, 20 (1980)(emphasis added).

[14] *United States v. Hodge*, 211 F.3d 74, 77 (3d Cir. 2000); *see also United States v. Catalan-Roman*, 585 F.3d 453, 473 (1st Cir. 2009); *United States v. Elusma*, 849 F.2d 76, 78 (2d Cir. 1988).

convicted as an aider and abettor, so long as the underlying criminal conduct is established.[15] If the government need not identify an actual principal, but only that a crime has been committed, it logically flows that the availability of jurisdiction over that unknown principal is irrelevant. Therefore, even under federal law, the amenability to prosecution of the principal is not a factor in determining whether someone properly may be convicted as an aider and abettor – the analysis focuses solely upon whether an underlying criminal offense has been established factually, and not on whether the principal is subject to jurisdiction.[16]

The cases cited to by appellant do not undercut this principle. They stand merely for the proposition that one cannot be held liable as an aider and abetter of something that

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[15] *United States v. Perry*, 643 F.2d 38, 45 (2d Cir. 1981)("To show a violation of 18 U.S.C. §2 it is not necessary to identify any principal at all, provided the proof shows that the underlying crime was committed by someone."); *see also United States v. Mullins*, 613 F.3d 1273, 1290 (10th Cir. 2010); *United States v. Staten*, 581 F.2d 878, 887 (D.C. Cir. 1978).

[16] It is not surprising that there is a lack of federal or state case law on point, as the military is unique in that jurisdiction is based on the status of the accused, rather than the location of the offense. Generally, one would expect that if a crime occurred within the jurisdiction of a state or the special maritime or territorial jurisdiction of the United States, the actors involved would be amenable to personal jurisdiction; therefore, there are likely few instances where federal or state courts would lack jurisdiction over the principal. This is in stark contrast to the military, where it is reasonable to conclude that soldiers might engage in criminal activity with civilians not subject to prosecution under the UCMJ.

is not itself a crime.[17] Here, Ms. King's wrongful use of oxymorphone is undoubtedly a criminal offense. Article 112a, UCMJ, 10 U.S.C. §912a, prohibits the use of controlled substances.[18] Oxymorphone is a Schedule II controlled substance.[19] Her wrongful use therefore violated Article 112a, UCMJ, and was a criminal offense; the only reason she could not be prosecuted (aside from her being deceased), is because the military lacked jurisdiction under Article 2, UCMJ. However, the lack of personal jurisdiction of the principal does not alter the criminality of the underlying conduct of which appellant aided and abetted. As the Army Court of Military Review in *Minor* correctly held, appellant's acts of aiding and

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[17] The following cases cited by appellant stand only for the proposition that a principal needs to have committed a crime: *United States v. Alvarez*, 610 F.2d 1250, 1254 n.3 (5th Cir. 1980); *United States v. Cades*, 495 F.2d 1166, 1167 (3d Cir. 1974); *United States v. Indelicato*, 611 F.2d 376, 385 (1st Cir. 1979); *United States v. Oscar*, 496 F.2d 492, 493 (9th Cir. 1974); *United States v. Pino*, 608 F.2d 1001, 1003 (4th Cir. 1979); *United States v. Staten*, 581 F.2d 878, 887 (D.C. Cir. 1978). The following additional cases cited by appellant stand only for the proposition that where the principal did not actually commit a crime (either because the conduct was not criminal or the principal was acting according to lawful authority), one cannot be convicted as an aider or abettor. *See United States v. Zerbst*, 111 F. Supp. 807, 811 (E.D.S.C. 1953); *United States v. Elliot*, 30 M.J. 1064, 1065-66 (A.C.M.R. 1990); *Manning v. Biddle*, 14 F.2d 518, 519 (8th Cir. 1926); *United States v. Hornaday*, 392 F.3d 1306, 1314 (11th Cir. 2004); *United States v. Ordner*, 554 F.2d 24, 29 (2d Cir. 1977).

[18] UCMJ, art. 112a(b)(3).

[19] 21 U.S.C. §812; *see e.g., McDiarmid v. Commissioner of Social Sec.*, 133 Soc. Sec. Rep. Serv. 161, 2008 WL 2945949 at *5, n.1 (W.D. Mich. 2008).

abetting the criminal act of wrongful use of a controlled substance is itself an offense, rendered no less so by virtue of the fact that the principal was not subject to jurisdiction under the UCMJ.[20]

This also comports with the language of Article 119, UCMJ. The "offense directly affecting the person" must be one committed by the appellant himself.[21] The "offense" is therefore appropriately focused on the acts of the accused. The question is not whether Ms. King committed a punishable offense when she wrongfully used a controlled substance. The question is whether appellant committed an offense when he aided and abetted Ms. King's wrongful use of a controlled substance. The unambiguous state of the law in at least the Army and Air Force service courts, implicitly recognized by this court, is that the lack of jurisdiction over Ms. King does not relieve appellant of liability as an aider and abettor under Article 77, UCMJ.

This Honorable Court should affirmatively adopt the principles of *Minor* and *Blevins* and hold that "[t]he amenability of the actual perpetrator to prosecution is not a requirement for criminal liability as an aider and abettor. The determinant is whether the act aided and abetted is an offense, not whether

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[20] *Minor*, 11 M.J. at 611.
[21] MCM, part IV, ¶44.b.(2)(d) ("while the accused was perpetrating . . . .")

the perpetrator is subject to prosecution."[22] By so holding, appellant's aiding and abetting Ms. King's wrongful use of a controlled substance would rightfully satisfy the "offense" requirement of Article 119, UCMJ.

Conclusion

WHEREFORE, the Government respectfully requests that this Honorable Court affirm the decision of the Army Court and grant appellant no relief.

KENNETH W. BORGNINO
Captain, JA
Appellate Government Counsel
U.S.C.A.A.F. Bar No. 35098

KATHERINE S. GOWEL
Major, JA
Branch Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 35191

AMBER J. ROACH
Lieutenant Colonel, JA
Acting Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 35224

[22] *Minor*, 11 M.J. at 611.

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KENNETH W. BORGNINO
Captain, Judge Advocate
Attorney for Appellee
March 7, 2013

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on March 7, 2013.

Daniel Mann
Lead Paralegal
Government Appellate Division
(703)693-0822